



JUL 17 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 267

UNITED STATES OF AMERICA, *Petitioner*,
v.
NEIFERT-WHITE COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Brief for the Respondent In Opposition

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QUESTION PRESENTED

It is the Respondent's position that the question presented can be more accurately stated in the following manner: Does filing an invoice in support of an application for a loan from a Government agency constitute participation in making a claim against the government with the meaning of the False Claims Act?

REASONS FOR DENYING PETITION
INTRODUCTION

The Government's Petition for a writ of certiorari should not be granted. In substance, the Government's argument is that the proper test for determining whether a "claim" has been made under the provisions of the False Claims Act is whether there has been a disbursement of Government Funds. It is, and has been, the position of the Respondent Neifert-White Company that a "claim" within the meaning of the False Claims Act is a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. The Respondent has based its position on the language and history of the Act and upon the opinions of this Court and the opinions of the Circuit Courts of Appeals and the District Courts of the United States. Four distinguished judges have expressed their agreement with Respondent's position.

Rule 19 of the rules of this Court sets forth the "character or reasons" which, although not exclusive, measure the exercise of this Court's discretion in granting or denying a petition for certiorari. In an attempt to come within the purview of Rule 19, the Government urges (Petition, page 5) that the decision below conflicts with those of other courts of appeals. Significantly, this is the only Rule 19 "reason" advanced in the Government's petition.

1. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS.

In support of its argument that the rulings of the circuit courts are in conflict, the Government relies heavily on *Rainwater v. United States*, 356 U.S. 590, and *United States v. Cato and Toepleman*, decided *sub nom. United States v. McNinch*, 356 U.S. 595. As both of the prior decisions in this case clearly point out, neither *Rainwater*, *Cato* nor *Toepleman* ever decided what it was that constituted the making of a claim against the Government under the provisions of the False Claims Act. All those cases decided was that a person who perpetrates a fraud against a Government-owned corporation is not insulated from liability because he has dealt with a Government-owned corporation rather than the Government itself. In short, the two decisions handed down in this case have not changed the law as stated in *Rainwater*, *Cato* and *Toepleman* because those cases never considered the question that has been presented in this case.

The Government argues in its Petition that the loan applications involved in *Rainwater*, *Cato* and *Toepleman* were presupposed to be "claims" within the meaning of the Act, and that, therefore, these cases must stand for the proposition that loan applications are "claims" under the False Claims Act. The Respondent respectfully submits that such presuppositions do

not constitute authority for that proposition. The simple and obvious reason is that the question was not presented to the Court in those cases and the Supreme Court, and indeed appellate courts in general, do not decide questions that are not presented to them. *Baltimore & Philadelphia Steamboat Company v. Augustus P. Norton*, 285 U.S. 408. Indeed, there is no evidence whatsoever that would indicate that the issue was ever raised at any level in the three cases relied upon so heavily by the Government. (See *United States v. Rainwater*, 244 F. 2d 27 (8th Cir. 1957) and *Toepleman v. United States*, 263 F. 2d 97 (4th Cir. 1957)).

For the same reasons we have just indicated, the Government's argument that the decision below withdraws the protection of the False Claims Act from the Commodity Credit Corporation's loan programs is completely without merit.

The Government's petition also states that the requirement that the "claim" involve an "assertion of legal right" has not been imposed by any other court as a basis for defeating False Claims Act liability in circumstances akin to those here presented. To this we only wish to reply that neither has the requirement that the "claim" involve an "assertion of a legal right" been rejected as a basis for defeating False Claims Act liability under *any* circumstances.

It would seem that the strongest authority that the

Government can find for its proposition that the courts below have rendered decisions that are not in harmony with the case law is to be found in *Sell v. United States*, 336 F. 2d 467 (10th Cir. 1954) and *United States v. Cherokee Implement Co.*, (D.C. Iowa, 1963) 216 F. Supp. 374. However, an examination of these cases leads to the same conclusion reached by the courts below, i.e. that they have no value as precedent because of the very obvious mistakes that are incorporated in the opinions.

The fundamental error in *Sell* was lucidly discussed by the court below at 372 F. 2d 377 (see also pages 22 and 23 of the Government's Petition). The court below pointed out that the court in *Sell* erroneously equated the requirements for conviction in the jointly tried criminal suit with the requirements for finding liability under the False Claims Act. The difference between the two is that the False Claims Act requires that a "claim" be made against the United States while the criminal statute requires only that a false statement be made for the purpose of influencing the action of the CCC.

The errors made by the court in the *Cherokee Implement* case were vividly demonstrated by Judge Murray's opinion in the case before us (see 247 F. Supp. at 882, or pages 33 and 34 of Petition). The fact that the 9th Circuit concurred in Judge Murray's evaluation of the *Cherokee Implement* case is

demonstrated by the fact that it did not even consider the case worthy of mention in its opinion, even though the case was thoroughly argued by both sides in their briefs. We do not consider the case of sufficient import to warrant further discussion here as any refutation would only be repetitious of the District Court's opinion.

2. THE RULE STATED IN *United States v. Cohn* THAT A "CLAIM" IS NOT MADE UNLESS THERE HAS BEEN A RIGHT ASSERTED AGAINST THE GOVERNMENT, BASED ON THE GOVERNMENT'S OWN LIABILITY, HAS ALWAYS BEEN THE LAW.

In the court below, the Government argued that *United States ex rel. Marcus v. Hess*, 317 U.S. 537 abrogated *United States v. Cohn*, 270 U.S. 339, and precluded the possibility of its use as a precedent in the instant case. Realizing the impropriety of their former position, the Government now seeks to explain *Cohn* and *United States v. McNinch*, 356 U.S. 595, on the theory that since neither case involved the distribution of government property, they did not involve a "claim". In other words, the Government is attempting to shore up its argument that the test for the presence of a "claim" is whether there has been a distribution of property. In addition to doing violence to the accepted legal and business usage of the term "claim", the Government's argument would completely nullify the use of the term in the Act, and

would, in effect, make 31 U.S.C. §231 a carbon copy of 18 U.S.C. §1001 (the criminal statute). It is entirely reasonable to conclude that since Congress included the term "claim" in one statute (i.e. the False Claims Act) and left it out of the other (i.e. the criminal statute) that it intended the standards for liability under the two Acts to differ in at least this one vital aspect.

The Government also argues that the definition of a "claim" as given by *Cohn* was merely dictum, and that it was directed at a "discrete set of circumstances" that bear no resemblance to the situation before us now. The answer to this argument is found in Judge Hamley's opinion in the circuit court and is found at 372 F. 2d 374-375 (see also pages 16-17 of the Petition). There, Judge Hamley pointed out that there were two reasons that were equally dispositive of the case, the first being that no right was asserted against the Government based on the Government's own liability, and the second was that the property which was sought and obtained was not that of the United States. This Court handed down the *Cohn* decision in 1926. In 1958 this Court reaffirmed validity of *Cohn* in the opinion it delivered in *McNinch*. *Cohn*, following the obvious dictates of the language of the statute, established the "assertion of right" test. This has always been the proper test for liability under the False

Claims Act and no decision by a Federal Court has ever said otherwise. This is the law. The 9th Circuit's opinion in this case merely affirmed the established rule. The law has not changed. No protection has been withdrawn which was present before. The Government is fighting to preserve a statute that existed only in its briefs. It is not the same statute that is found at 31 U.S.C. §231.

3. THE COURT BELOW PROPERLY REFUSED TO GIVE A BROADER INTERPRETATION TO THE ACT THAN IS SANCTIONED BY THE LANGUAGE OF THE ACT OR THE DECISIONS OF THIS COURT.

The Government argues that "There is no sound reason why the application of the False Claims Act to a fraudulent application for a federal loan should depend upon whether Congress made the granting of the loan mandatory or permissive." (Petition, pages 8-9). The sound reason the Government seems to have overlooked is found in the language of the act.

"... [I]t is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." *United States v. Cohn*, 270 U.S. 339, at 345-346. (Emphasis supplied).

The Government cites *United States v. McNinch*,

supra for the proposition that the underlying purpose for enacting the False Claims Act was to stop the plunder of the public treasury. We hasten to point out that the *McNinch* opinion also contains the following statement: "At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch, supra*, at 599. The types of fraud clearly excluded are those that do not involve "claims". An additional point is that an invitation to enter into a secured loan agreement can hardly be classified as "plunder of the treasury."

We wish to quote further from *McNinch*.

"But it must be kept in mind, as we explained in *Rainwater*, that in determining the meaning of the words 'claim against the Government' we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions." *United States v. McNinch, supra* at 598.

In footnote 6 on page 9 of the Petition, the Government argues that the rule of construction followed in *Rainwater* should apply here, and since *Rainwater* involved an application for a CCC loan, the Government is justified in construing the statute in such a manner as to allow it to be applied here. The Government has confused the issues. In *Rainwater*, the

sole question was whether a claim against the CCC was a claim against the Government within the meaning of the Act. In holding that it was, the Court obviously felt that the Act had been given a fair meaning in accord with the evident intent of Congress. The fallacy in the Government's argument lies in the fact, already discussed, that *Rainwater* did not decide or even consider the question as to whether an application for a CCC loan was a claim within the meaning of the Act. Therefore, application of the same rule of construction in the instant case will not necessarily yield the same result as it did in *Rainwater* (i.e. liability under the Act) for the very obvious and simple reason that in the present case we are dealing with an entirely different question that involves a separate and distinct provision in the statute.

It is a well established principle that where a statute imposes criminal sanctions, as the False Claims Act indeed does, the language of the statute should be required to give fair warning to the public as to what sort of conduct is condemned, and further, that if any ambiguity exists in such a statute, the ambiguity should be construed against the government. In deciding that an airplane did not come within the meaning of the term "motor vehicle" under the provisions of the National Motor Vehicle Theft Act, the eminent Mr. Justice Holmes said:

"... [I]t is reasonable that a fair warning

should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States*, 283 U.S. 25 at 27.

If four distinguished and learned Federal Judges have decided that the Respondent's conduct was not condemned by the language of the False Claims Act, then it certainly cannot be said that the Respondent, whose officers are mere laymen, could possibly have had fair warning that its conduct would subject it to False Claims Act liability.

The Government is also worried about the disparity between the results if a farmer falsely certifies that he is eligible for a price support payment on his crop and a loan for crop storage facilities. The cause of the Government's worry was pointed out by *McNinch*. The False Claims Act simply does not cover all types of fraud. Thus, the Government's quarrel is not with the application of the statute, but rather, with the statute itself.

4. THE GOVERNMENT'S ARGUMENT THAT THE DECISION BELOW WILL HAVE AN ADVERSE EFFECT ON VARIOUS GOVERNMENT PROGRAMS HAS NO MERIT.

The Government urges that if the decision below is allowed to stand, it will have a "substantial impact upon the administration of numerous federal loan and subsidy programs." This is the identical argument advanced in the court below and rejected in Judge Hamley's decision (372 F. 2d at 378, and page 24 of the Petition). As pointed out in the decision below, this argument cannot and does not justify broadening of the interpretation given this Civil War statute by this Court in *Cohn* and *McNinch*. Moreover, if the Government needs relief, that relief must come from Congress and not from the courts.

It is obvious that if all of the loans and support payments involved in the myriad of programs administered by the CCC, not to mention the poverty and educational programs administered by the Department of Health, Education and Welfare, contain the same provisions as the secured loans involved in the instant case, the False Claims Act is not needed to prevent any plundering of the treasury.¹ The mort-

¹The terms of the loan contracts involved in this case can be found at 23 Federal Register 5029 (July 2, 1958). It is to be noted that §474.752 requires that the county committee, or some other person authorized by the CCC, make a determination as to whether a mortgage on the facility alone is sufficient security for the loan. If it is not, the county committee can demand an addi-

gage agreements here supply all the protection that the Government could ask for. It should be noted that the pleadings in this case indicate that not more than a few hundred dollars was loaned out improperly by the Government in all of the twelve individual transactions. Moreover, the pleadings, for very good reason, do not contain any allegation that any of the loans were ever defaulted or that the Government suffered so much as the loss of one penny in these transactions, and indeed, the implication is clear that it profited to the extent of the interest on the principal.

Finally, the Court below pointed out that the Government's argument on this point overlooked the fact that the Government could prosecute criminally. In answer, the Government in its Petition advises that they regard the False Claims Act as their "primary weapon" and that the penalties of the criminal law should be "reserved for circumstances which particu-

tional mortgage on a saleable unit of real estate as further security. As additional insurance, §474.727 of the Regulations requires that the constructed facility be inspected by a designated employee of the county committee or the committee itself before the actual disbursement of the loan takes place.

The loans are made for a period of 4 years and the interest rate is 4% per annum on the unpaid balance. The Regulations provide that the contract is to include an acceleration clause and a severance agreement. All liens required as security must be first liens. It is clear that only the gross neglect or incompetence of the county committee could cause the Government to lose any money under agreements such as these, regardless of the percentage of the purchase price of the facility that the Government actually financed.

larly call for such sanctions." (Petition, page 11, footnote 7). They fail to advise this Court that Neifert-White has already been prosecuted under the criminal act (Criminal No. 3940, U.S. District Court for the District of Montana, Helena Division), although none of the farmers and ranchers who actually made the applications for loans have ever been touched by the wrath of the Justice Department.

CONCLUSION

In conclusion, we respectfully submit that the Petition for Writ of Certiorari should be denied for the reason that no question is presented here which requires resolution by the Supreme Court, and for the additional reason that the Respondent should not be put to the great expense of defending yet another appeal that is based on neither law nor reason.

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July 14, 1967